COURT OF APPEALS
DECISION
DATED AND FILED

JUNE 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 99-0098-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICHARD G. GIESE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: WALTER J. SWIETLIK, Judge. *Affirmed.*

ANDERSON, J. Richard G. Giese challenges the circuit court's refusal to bar consideration of a prior 1992 operating a motor vehicle while intoxicated (OMVWI) conviction for penalty enhancement purposes on the basis that the prior conviction arose from a constitutionally infirm no contest plea. Giese claims that the 1992 plea colloquy was constitutionally defective because that court failed to elicit whether Giese knew the specific elements of the offense. As a result, he argues that the court should have ignored his 1992 conviction and

treated the current offense as his first and not his third offense.[1] We affirm because Giese has failed to make the two-part showing required to prove that a prima facie violation of § 971.08, STATS., occurred during his 1992 plea hearing.

Giese was charged with two separate counts for operating a motor vehicle while intoxicated. Count one charged Giese with OMVWI, third offense, contrary to §§ 346.63(1)(a) and 346.65(2)(c), STATS. Count two charged him with OMVWI with 0.08 grams or more of alcohol in a liter sample of his breath, third offense, contrary to §§ 346.63(1)(b) and 346.65(2)(c). Giese pled guilty to count one and count two was dismissed.

After judgment, Giese moved the court to not consider a previous OMVWI conviction to enhance the penalty for his present conviction. Giese argued that his plea to the previous conviction was constitutionally invalid because the court failed to ascertain whether he understood the specific elements of the offense to which he was pleading. After a hearing on the motion, the court,

[1] To determine the appropriate penalty for an OMVWI conviction, we use the date of the incident that resulted in the conviction. *See* § 346.65(2c), STATS. Giese has two prior convictions for OMVWI. The first conviction occurred in June 1990 for an April 1990 incident. The second conviction, which Giese now asserts had a constitutionally infirm plea hearing, occurred in June 1992 for a March 1992 incident. His third conviction, and the subject of this appeal, occurred in September 1998 for an April 1998 incident.

The statute under which Giese was charged for the 1998 conviction required two OMVWI convictions within five years or three within ten years for an enhanced penalty to apply. *See* § 346.65(2)(b), (c), STATS., 1995-96. Therefore, if the 1992 conviction is not considered for sentencing purposes, then more than five years will have transpired since Giese's first conviction in 1990 and the last in 1998. He would not be eligible for any penalty enhancement because of the multiple convictions; the 1998 conviction would be treated the same as his first OMVWI conviction for sentencing purposes.

We note that this would not be the result for someone charged today. Effective January 1, 1999, this section has been modified. *See* 1997 Wis. Act 237, §§ 527yg, 527 yh, 9348(2f), 9448. Now, individuals will receive an enhanced penalty for two OMVWI convictions within a ten-year period or whenever they receive three total OMVWI convictions. *See* § 346.65(2)(b), (c), STATS.

considering the supporting evidence presented by Giese, determined that Giese's plea to the prior conviction was freely, voluntarily and intelligently entered. Giese appeals and reasserts the same argument before this court.

It is undisputed that the sentencing scheme for repeat OMVWI offenses uses prior convictions primarily to enhance punishment. *See* ***State v. Foust***, 214 Wis.2d 568, 574, 570 N.W.2d 905, 908 (Ct. App. 1997). Because the statute is a penalty enhancer, a defendant can attack a prior conviction obtained in violation of constitutional rights if the prior conviction is used to support guilt or enhance punishment for another offense. *See* ***id.*** at 572, 570 N.W.2d at 907.

When collaterally attacking a prior conviction, the defendant has the initial burden of coming forward with evidence to make a prima facie showing that he or she was deprived of a constitutional right at the prior proceeding. *See* ***State v. Baker***, 169 Wis.2d 49, 77, 485 N.W.2d 237, 248 (1992). A constitutionally effective plea must be "knowingly, voluntarily and intelligently entered." ***State v. Bangert***, 131 Wis.2d 246, 252, 389 N.W.2d 12, 16 (1986). Not only must the defendant make a showing of a prima facie violation of § 971.08, STATS., the defendant must also allege that he or she did not know or understand the information which should have been provided at the plea hearing. *See* ***State v. Giebel***, 198 Wis.2d 207, 216, 541 N.W.2d 815, 818 (Ct. App. 1995). If the defendant is successful on both steps, the State must then prove that the defendant's plea in the prior proceeding was constitutionally proper. *See* ***Baker***, 169 Wis.2d at 77, 485 N.W.2d at 248. Accordingly, the question we must answer is whether Giese made a prima facie showing of a violation, alleged his lack of understanding of the unprovided information and, if so, did the State counter with proof that the plea was constitutionally valid.

When there is a collateral attack on a plea, "the voluntariness of a plea should not be tested by determining whether a litany of the formal legal elements was read to the defendant. Instead, a court may consider the totality of the circumstances to make such a determination." ***Bangert***, 131 Wis.2d at 258, 389 N.W.2d at 19 (citation omitted). Applying these standards to this case involves the application of constitutional standards to undisputed facts, which is a question of law this court decides de novo. *See* ***State v. Phillips***, 218 Wis.2d 180, 195, 577 N.W.2d 794, 801 (1998).

Giese asserts that the court failed to ascertain whether he understood the nature of his offense when he entered his plea to the 1992 conviction. Specifically, he complains that during the plea colloquy the court failed to go through the elements of the offense. As a result, he claims his plea was constitutionally infirm and cannot be considered for penalty enhancement of his current conviction.

Indeed, "a defendant cannot make a truly voluntary or intelligent admission that he or she committed the offense charged unless he or she is aware of its essential elements and their relationship to the facts of the particular case …." ***State v. Minniecheske***, 127 Wis.2d 234, 242-43, 378 N.W.2d 283, 288 (1985) (quoted source omitted). As we have noted, this does not require a "litany of the formal legal elements," but does require that the totality of the circumstances conveys that the defendant's plea was "knowingly, voluntarily and intelligently entered." ***Bangert***, 131 Wis.2d at 252, 258, 389 N.W.2d at 16, 19. A court can assure a defendant's understanding of the elements by: (1) personally giving a summary of the elements to the defendant, (2) inquiring whether the defendant's attorney explained the elements to the defendant and then having the attorney reiterate what he or she explained to the defendant, or (3) referencing to

the record or other evidence that demonstrates the defendant's understanding of the nature of the charge. *See* ***State v. McKee***, 212 Wis.2d 488, 492, 569 N.W.2d 93, 95 (Ct. App.), *review denied*, 215 Wis.2d 426, 576 N.W.2d 281 (1997).

The plea hearing transcript for the 1992 conviction shows that the circuit court did not follow any of these methods. The plea colloquy reads in its entirety as follows:

> THE COURT: This matter was last called on May 18th…. A criminal complaint has now been filed charging [Giese] with operating while under the influence of an intoxicant for the second time in a five year period. A plea of not guilty had been entered.
>
> I have now received for filing a plea of no contest; is that right?
>
> [DEFENSE COUNSEL]: That's correct, your Honor.
>
> THE COURT: Do you understand that you would be subject to a fine of not less than $300.00 nor more than $1,000.00 plus imprisonment of not less than five days nor more than six months in the county jail upon conviction?
>
> MR. GIESE: Yes.
>
> THE COURT: And your plea is no contest?
>
> MR. GIESE: Yes.
>
> THE COURT: Do you understand that by pleading no contest you waive your right to a jury trial?
>
> MR. GIESE: Yes.
>
> THE COURT: Do you understand that if you were to have a jury all 12 jurors would have to unanimously agree upon your guilt before you could be convicted?
>
> MR. GIESE: Yes.
>
> THE COURT: You also waive your right to confront and cross examine your accusers; do you understand that?
>
> MR. GIESE: Yes.
>
> THE COURT: And knowing all those things do you still wish to plead no contest?
>
> MR. GIESE: Yes.

> THE COURT: The court will find the defendant's plea of no contest is freely, voluntarily and intelligently entered. [Defense counsel], do you stipulate to the underlying facts in support of the plea?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: The court will find that a factual basis for the plea exists. I'll find the defendant guilty.

This sparse plea colloquy reveals that the 1992 court did not follow the appropriate procedures for ascertaining Giese's understanding of the nature of the charged offense. The 1998 court, in denying Giese's motion to preclude consideration of the 1992 conviction for sentencing purposes, relied on the fact that Giese had signed a plea questionnaire and had thereby certified that he had read the criminal complaint, understood the charge and its elements, and had discussed the questionnaire's contents with his attorney. Yet the 1992 court did not reference the questionnaire during the plea colloquy as evidence of Giese's understanding. Nor did the 1992 court ask defense counsel whether he or she had explained the elements to Giese and then have counsel reiterate what was explained. We find no case law in this state holding that a plea questionnaire, standing alone, sufficiently conveys that a defendant understood the nature of his or her offense. A court must get some form of an affirmation that the defendant has "an awareness of the essential elements of the crime." ***Bangert***, 131 Wis.2d at 267, 389 N.W.2d at 23.

In spite of the fact that we may presume that Giese's counsel explained the nature of the charges to him, *see* ***Baker***, 169 Wis.2d at 74, 485 N.W.2d at 247, we determine that Giese has satisfied the first requirement for challenging his plea by demonstrating a prima facie violation of § 971.08, STATS.

The second requirement is that "the defendant must allege that he or she in fact did not know or understand the information which should have been

provided at the plea hearing." ***Giebel***, 198 Wis.2d at 216, 541 N.W.2d at 818. In ***Giebel***, we concluded that Giebel had failed to allege this fact:

> Giebel's motion contains no allegations that he did not know or understand the elements of armed robbery. While he precisely asserts specific facts describing the trial court's failure to conduct a complete plea colloquy, he fails to include any assertions that meet the second threshold requirement of ***Bangert***: that Giebel in fact did not know or understand the information which should have been provided at the plea hearing.

Giebel, 198 Wis.2d at 217, 541 N.W.2d at 819.

We have reviewed Giese's motion and the transcript of the motion hearing and find no allegation that Giese did not know or understand the missing OMVWI elements from the 1992 plea hearing. In his defense, Giese contends that the State knew this was the argument he was making at the plea hearing and failed to make an objection at that time. In contrast, Giese is the party challenging his plea and carrying the burden of proof; the State is not required to remind Giese of his missing arguments. Because Giese failed to meet this second threshold requirement for challenging his plea, we affirm the court's denial of his motion to bar the 1992 conviction from consideration for sentencing purposes.[2]

By the Court.—Judgment and order affirmed.

[2] In its brief, the State raises an additional argument. It contends that we incorrectly decided ***State v. Foust***, 214 Wis.2d 568, 570 N.W.2d 905 (Ct. App. 1997). Giese responds that the State has waived this argument because it failed to argue it before the circuit court. *See* ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992) (stating that we do not address issues raised for the first time on appeal). We agree. In any event, we are obligated to follow existing precedent of this court. *See* ***Cook v. Cook***, 208 Wis.2d 166, 190, 560 N.W.2d 246, 256 (1997).

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.